IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

LOLA WINSTON PLAINTIFF

V. NO. 2:98CV161-B-B

TB OF MISSISSIPPI, INC. , ET AL. DEFENDANTS

Memorandum Opinion

This cause comes before the court on the plaintiff's motion to remand. The defendants oppose the motion and request dismissal of the claims against defendants Longale and Taylor pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The court has duly considered the parties' memoranda and exhibits and is ready to rule.

The defendants removed this action from state court on the ground of diversity jurisdiction. Diversity of citizenship exists between the plaintiff, a Mississippi citizen, and defendant TB of Mississippi, Inc., an Arkansas citizen. The notice of removal alleges that nondiverse defendants Longale and Taylor are fraudulently joined. If fraudulently joined, the citizenship of Longale and Taylor is not considered in determining whether diversity of citizenship exists. Rodriguez v. Sabatino, 120 F.3d 589, 592 (5th Cir. 1997), cert. denied, 140 L. Ed. 2d 665 (1998); Jernigan v. Ashland Oil, Inc., 989 F.2d 812, 817 (5th Cir.), cert. denied, 510 U.S. 868, 126 L. Ed. 2d 150 (1993). The removing party carries a heavy burden in establishing fraudulent joinder and must demonstrate it by clear and convincing evidence. Jernigan, 989 F.2d at 815; B., Inc. v. Miller Brewing Co., 663 F.2d 545, 549 (5th Cir. 1981). Fraudulent joinder may be established by showing outright fraud in the plaintiff's pleading of jurisdictional facts. Jernigan, 989 F.2d at 815; B., Inc., 663 F.2d at 549. In addition, "a joinder is fraudulent if the facts asserted with respect to the resident defendant are shown to be so clearly false as to demonstrate that no factual basis existed for any honest belief on the part of the plaintiff that there was joint liability." Bolivar v. R & H Oil & Gas Co., 789 F. Supp. 1374, 1376-77 (S.D. Miss. 1991). Fraudulent joinder may also be established as follows:

> To prove their allegation of fraudulent joinder [the removing parties] must demonstrate that there is no possibility that [the plaintiff] would be able to establish a cause of action against [the nondiverse defendants] in state court. In evaluating fraudulent joinder claims, we must initially resolve all disputed questions of fact and all ambiguities in the controlling state law in favor of the non-removing party. We are then to determine whether that party has any possibility of recovery against the party whose joinder is questioned.

Dodson v. Spiliada Maritime Corp., 951 F.2d 40, 42 (5th Cir. 1992), cited in Burden v. General Dynamics Corp., 60 F.3d 213, 216 (5th Cir. 1995). If "there is no possibility that the state court would recognize a valid cause of action against the non-diverse defendants...then those defendants have been fraudulently joined." Burden, 60 F.3d at 217-18. See Laughlin v. The Prudential Ins. Co., 882 F.2d 187, 190 (5th Cir. 1989) ("the court may find fraudulent joinder only if it concludes that the plaintiff has no possibility of establishing a valid cause of action against the in-state defendant"). The Fifth Circuit has stated:

> Mindful of our obligation to exercise diversity jurisdiction only in cases of complete diversity, we will not authorize removal on the basis of fraudulent joinder unless there is *no possibility* that the plaintiff could state a cause of action against the non-diverse defendants.

Sid Richardson Carbon & Gasoline Co. v. Interenergy Resources, LTD., 99 F.3d 746, 751-52 (5th Cir. 1996) (emphasis in original) (citing B, Inc., 663 F.2d at 549).

The plaintiff moves to remand on the ground that there is a possibility of viable negligence claims against the nondiverse defendants whose citizenship defeats diversity jurisdiction.[1] The plaintiff brought this slip and fall action for injuries she sustained when she allegedly slipped and fell in a puddle of water on the floor of Taco Bell in Cleveland, Mississippi. The complaint alleges that Longale and Taylor, as "on-duty managers" of Taco Bell, were negligent in failing to report water leaks to the corporate office, failing to supervise

[1]28 U.S.C. § 1441(b) prohibits removal of a diversity action in which any properly joined and served defendant "is a citizen of the State in which such action is brought." Although defendants Longale and Taylor are Mississippi citizens, the plaintiff does not assert and therefore waives this procedural defect. Marathon Oil Co. v. Ruhrgas, 145 F.3d 211, 221 (5th Cir.) (citing In re Shell Oil Co., 932 F.2d 1518, 1523 (5th Cir. 1991), cert. denied, 502 U.S. 1049, 116 L. Ed. 2d 814 (1992)), cert. granted, ___ U.S. ___, 142 L. Ed. 2d 532 (1998). See 28 U.S.C. § 1447(c).

the on duty employees, inspect the premises and remove a dangerous condition and in failing to warn customers of a known dangerous condition. The defendants assert that the complaint alleges that Longale and Taylor breached managerial duties owed to their employer, the corporate defendant, and not to the plaintiff. They contend that Longale and Taylor cannot be personally liable unless their acts or omissions are independent of their employer's duty owed to the general public to maintain reasonably safe premises; in other words, they cannot be vicariously liable for their employer's negligence. The defendants further contend that the complaint does not allege any negligent act or omission on the part of Longale and Taylor that created or caused the alleged dangerous condition. See Wheeler v. Frito-Lay, Inc., 743 F. Supp. 483, 486 (S.D. Miss. 1990) (construing Mississippi law) (the respondeat superior doctrine "does not operate to relieve the employee of liability"); Wilson v. South Central Mississippi Farmers, Inc., 494 So. 2d 358, 361 (Miss. 1986) (under Mississippi law, "any officer or agent of a corporation who actively participates in the commission of a tort...is personally liable to third persons injured thereby") (citations omitted).

It is well settled:

> In Mississippi, an owner, occupant, or *person in charge* of a premises owes to an invitee or business visitor a duty to exercise ordinary care to keep the premises in a reasonably safe condition or to warn the invitee of dangerous conditions, not readily apparent, which the owner or occupier knows of or should know of in the exercise of reasonable care.

Waller v. Dixieland Food Stores, Inc., 492 So.2d 283, 285 (Miss. 1986) (slip and fall case) (emphasis added). The Mississippi Supreme Court has recognized a negligence cause of action against a store manager, as well as the store owner, for failing to keep the premises reasonably safe or to warn of a dangerous condition. J.C. Penney Co. v. Sumrall, 318 So.2d 829, 831-32 (Miss. 1975) ("the duty of the [defendant store owner and store manager] required them only to eradicate the known dangerous situation within a reasonable time or to exercise reasonable diligence in warning those who were likely to be injured because of the danger"); Howell v. Ernest Yeager & Sons, Inc., 215 So.2d 702 (Miss. 1968) (possible liability on the part of the

store owner and manager for employee's dropping of a banana on which plaintiff allegedly fell); Moore v. Winn-Dixie Stores, Inc., 173 So.2d 603, 608 (Miss. 1965) ("question of fact...as to whether or not the banana peel had been on the floor a sufficient length of time to charge the [defendant store owner and store manager] as reasonable and prudent operators of the store with notice of the danger"); Sears, Roebuck & Co. v. Burke, 44 So.2d 448, 451 (Miss. 1950) (store owner and manager liable for a customer's injuries sustained when a package fell against her back). The court in Moore stated:

> [T]he settled rule in this State requires the *operator of premises* to exercise reasonable diligence to keep such premises in a reasonably safe condition for the use of an invitee....

173 So.2d at 606 (citation omitted) (emphasis added).

Longale testified in his deposition[2] that, as the general manager, he was responsible for inspecting the store for dangerous conditions, including ceiling leaks, and to correct them. Taylor testified in her deposition[3] that, as the assistant manager, she was physically present in the store at the time of the plaintiff's fall. The court finds that the negligence claims against Longale and Taylor for failure to inspect and to warn give rise to possible liability on their part under Mississippi law. Therefore, neither Longale nor Taylor is fraudulently joined.

Since the court lacks diversity jurisdiction, the instant motion is well taken and should be granted. An order will issue accordingly.

THIS, the ____ day of August, 1998.

NEAL B. BIGGERS, JR.
CHIEF JUDGE

[2]The parties submitted copies of depositions without citing any particular portions.

[3]*See* supra note 2.